No. 84-1667

In The
Supreme Court of the United States
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403;
CHRISTY B. INGLE; DAVID C. RICH;
J. BRUCE ALEXANDER; AND
GERALD E. HOSMAN,
Petitioners,

vs.

MATTHEW N. FRASER, A MINOR,
AND E. L. FRASER, AS HIS
GUARDIAN AD LITEM,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ARGUMENT

1. Viewpoint Neutral Regulation of Indecent Student Speech Is Permissible in the School Environment.

Fraser asserts that Petitioners [the "District"] can discipline him for his assembly talk only if it falls within one of several narrowly drawn categories of speech exempt from first amendment protection. Resp. Br. at 9-11. This analysis presupposes a categorical delineation between protected "speech," immune from any content based regulation, and constitutional "nonspeech," which is subject to governmental suppression because its social value does not warrant first amendment protection. *Id.* See, *e.g. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)(fighting words); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); L. Tribe, *American Constitutional Law*, 602-608, 670-672 (1978). This rigid analysis, however, fails to address the special first amendment considerations arising from indecent student speech in public schools. The District contends that this Court's precedents not only require a balancing of the compelling state interests implicated by sexually offensive student speech at school sponsored functions, but also teach that viewpoint neutral discipline in response to such speech is constitutionally permissible.

This Court has employed a balancing analysis for content based governmental responses to speech within a specific environment, forum, or medium in a series of decisions. See, *e.g., Connick v. Myers*, 461 U.S. 138 (1983) (speech of public employees in the workplace); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) ("public forum" analysis); *Board*

of Education v. Pico, 457 U.S. 853 (1982) (removal of school library books); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (sanctions for indecent radio broadcasts); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (special zoning requirements for adult theaters). The common analytical ground of these decisions is a balancing of free expression interests against governmental claims that the expression interferes with control over its property or is incompatible with its activities in a specific context.[1] Contrary to Fraser's assumptions, these precedents reveal that not all content based regulation of speech triggers the rigid speech/nonspeech categorization analysis he proposes. Most significantly, these decisions, and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), demonstrate that sexually offensive student speech at school sponsored activities is incompatible with the goals and responsibilities of public education and warrants viewpoint neutral discipline. Pet. Br. at 12-29.

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1. Fraser and the National Education Association argue that cases such as *Perry Education Association* and *Cornelius v. NAACP Legal Defense and Education Fund*, 87 L.Ed.2d 567, 105 S. Ct. 3439 (1985), are irrelevant because their reasoning is limited to the problem of a speaker's access to a particular forum. Resp. Br. at 27, NEA Br. at 7-8. The focus of "forum" analysis, however, is the compatibility of the asserted free expression rights with the government's interest in preserving the "forum" for its own purposes. Pet. Br. at 12-17. In this light, a factual distinction between access and discipline of a student speaker is irrelevant. This argument, moreover, assumes that the student assembly was a limited public forum, or forum by designation, without analyzing the District's interests in controlling this educational activity. Thus, it begs the question of whether Fraser's speech was incompatible with the District's educational mission. Accordingly, "public forum" cases are revelant because they, like *Myers*, *Pico*, and *American Mini Theatres*, help identify the competing interests that must be weighed in reviewing viewpoint neutral, but content sensitive, restrictions on expression limited to a certain environment.

2. Fraser's Depiction of Sexual Activity Was Not Speech on a Matter of Public Concern.

Fraser uncritically assumes his speech was entitled to full first amendment protection. In *Connick v. Myers*, however, this Court held that discipline of public employees based on expressive activity in the workplace does not trigger first amendment scrutiny when the "expression cannot be fairly considered as relating to any matter of political, social or other concern to the community. . . ." 461 U.S. at 146.[2] Absent such a showing, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 157. To determine whether speech involves a matter of public concern, the issue "must be determined by the content, form and context of a given statement as revealed by the whole record. . . ." *Id.* at 147-148. Significantly, *Myers* recognizes that although discipline for public employee speech on matters of personal concern does not invoke judicial review, such speech is nonetheless entitled to first amendment protection outside of the limited environment of governmental employment. *Id.* at 146-147.

Myers is applicable to student disciplinary actions. Public school administrators, like public employers, require discretion to manage the educational program to

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2. Although the dissent would have characterized Myers' speech as involving matters of public concern, it did recognize that in the balancing of a public employer's interests against an employee's first amendment rights, the content of the employee's expression is a relevant consideration. 461 U.S. at 157 n.1 (Brennan, J., dissenting).

achieve its desired ends. Indeed, the dissent in *Myers* expressly observed that public schools and public employment are similar contexts for the purpose of determining the extent of first amendment rights. *Id.* at 168-169 (Brennan, J., dissenting). Furthermore, unlike public employers, public schools have an educational responsibility to teach students community standards of decency and civility. Pet. Br. at 17-21. Although public employers generally have no legitimate interest in regulating employee discourse absent interference with productivity, public schools have an interest in regulating student speech extending beyond prevention of disruption to the independent educational goal of teaching students social and moral standards for the form of public discourse. Given these considerations, discipline of either public employees or public school students for speech not involving matters of public concern does not trigger judicial scrutiny under the first amendment.

The record reveals the District disciplined Fraser not for any expression of views on matters of public concern, but for his offensive depiction of sexual activity. Although Fraser attempts to characterize the discipline as retaliation for implied criticism of the school administration in his talk, his testimony reveals the sexual innuendo neither served a political purpose nor was indispensable to his purported "message." Resp. Br. at 30-33.[3] Instead, it was an attempt at "humor":

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3. Fraser boldly asserts his "message" could not have been communicated as effectively by any other means; thus, the discipline was viewpoint supression. Resp. Br. at 33. This approach, however, collapses the distinction between government suppression of viewpoint, which violates its fundamental

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Q . . . What was the purpose of the speech?

A The purpose of the speech when I wrote it was to amuse the audience and hopefully to establish a rapport with the audience so that I could get my candidate elected.

. . .

Q You deliberately used sexual innuendos in this speech, did you not?

A Yes.

Q You anticipated that when you gave this speech that the audience would perceive the sexual innuendos, did you not?

A I expected that some people would pick it up, yeah.

JA at 45-46. The District's hearing officer, moreover, expressly found the discipline was motivated solely by Fraser's intentional use of sexual innuendo and connotations, not by any implied criticism of the school admini-

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obligation of neutrality, and content sensitive, but viewpoint neutral, regulation of speech based upon special first amendment considerations inherent in a limited environment. See, e.g., *Myers, Perry Education Association, Pico, Pacifica,* and *American Mini Theatres. See generally,* Farber and Nowak, *The Misleading Nature of Public Forum, Analysis, Context and Content First Amendment Adjudication,* 70 Va. L. Rev. 1219 (1984); Farber, *Content Regulation and the First Amendment: A Revisionists' View,* 68 Geo. L.J. 727 (1980); Stephan, *The First Amendment and Content Discrimination,* 68 Va. L. Rev. 103 (1982); Note, *Content Regulation and the Dimensions of Free Expression,* 96 Harv. L. Rev. 1854 (1983). Clearly, if Fraser had expressed his purported critique of school administration without sexual references, the speech in itself would provide no basis for disciplinary action.

stration. JA at 101-103. Indeed, Fraser's prior criticisms of school officials, lacking sexual innuendo, did not provoke disciplinary action, even when he confronted a school administrator before a group of students and accused him of wrongdoing. JA at 51; Tr. of Proc. (CR 15) at 54.[4]

Under *Myers*, then, the proper inquiry is whether a juvenile rape fantasy expressed to a captive audience of students at a school-sponsored assembly involved a matter of public concern. Surely, Fraser's description of a "man firm in his pants," who "takes his point and pounds it in," who "doesn't attack things in spurts," and who "goes to the very end—even the climax," is not expression that can be "fairly considered as relating to any matter of political, social or other concerns of the community. . . ." 461 U.S. at 719. The District's discipline of Fraser, there-

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4. Fraser makes several factual assertions that either are unfounded or were disputed at trial concerning the District's alleged motive for disciplining him. Resp. Br. at 1, 4, 30-31. First, the district court made no findings that criticism of school administrators played a role in the disciplinary action. PC App. at B-1 to B-7. Indeed, Judge Tanner denied Fraser's post-trial motion to amend the Findings of Fact and Conclusions of Law to incorporate his theory that he was singled out for discipline because of such criticism. Clerk's Docket #9-10, JA 1-2. Second, the District's Answer denied Fraser's allegations that administrators were "hostile" to him because of his written and oral comments on school administration. Complaint ¶ 16-17, JA 6; Answer ¶ 16-17, JA 21-22. Petitioner Rich, the school principal, testified that he admired Fraser for his past speeches concerning school administration, including the challenging way in which they were written, but they played no role in the decision to discipline him for the assembly talk. JA 84-85. Fraser also testified the administrators who actually disciplined him had never retaliated against him for his criticism of the administration. JA at 56-57.

fore, did not implicate first amendment interests sufficient to warrant judicial review.[5]

3. The District Does Not Seek to Suppress the Topic of Sexuality.

Fraser contends the District seeks to suppress the topic of sexuality and that it was powerless to discipline his speech because "sexual metaphors or puns" are common rhetorical devices in political speech and literature. Resp. Br. at 6-7, 11-14. This argument ignores both the context of his talk, and the District's educational interest in regulating the deliberate use of sexually offensive expression.

Indecent forms of expression may be subject to regulation in certain limited environments, even though entitled to first amendment protection in other contexts. *FCC v. Pacifica Foundation*, 438 U.S. at 744-51; *Young v. American Mini Theatres*, 420 U.S. at 63-73.[6] Similarly, in

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5. *Tinker*, moreover, is consistent with *Myers*. In contrast to Fraser's gratuitous use of sexual innuendo, *Tinker* involved discipline of students for a nonoffensive and nondisruptive symbolic expression of their viewpoint on the Viet Nam conflict—a subject of undeniable public concern. Pet. Br. at 12-14. In short, *Tinker's* protection against suppression of student speech based on viewpoint, and its "material disruption" dicta, presuppose that the views students express involve a matter of public concern.

6. Contrary to Fraser's assertions, the rationale for allowing school authorities to regulate offensive or indecent forms of student expression is even stronger than in the contexts considered in *Pacifica* or *American Mini Theatres*. See Resp. Br. at 19, 39; NEA Br. at 4-5. *Pacifica* is not based upon the special sanctity of the radio listener's home; the dispute arose

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Board of Education v. Pico, the plurality acknowledged that public school officials retain discretion to remove library books on grounds of educational suitability, including vulgarity and bad taste. 457 U.S. at 871-72. Fraser's debasing depiction of sexual activity, which included vocal emphasis on sexual connotations to insure his meaning was clear, pervaded his entire speech. The speech was not only educationally unsuitable because it was "pervasively vulgar" and in "bad taste," but also indecent and offensive under the ordinary definition of "obscene" as construed by the District in its disruptive conduct rule. Pet. Br. at 32.

Fraser's attempt to equate discipline of his "I know a man who is firm" speech with censorship of Melville or Shakespeare further ignores the necessity of analyzing the speech within its particular context. To be sure, sexual innuendo, puns, and themes appear in classroom texts and library books used within the District. But such materials are either presented in a responsible, nonoffensive manner by professional educators in courses tailored to the age and maturity of students or are matters of voluntary student inquiry.

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when a father heard the "Filthy Words" monologue on his car radio while driving with his son and then complained to the FCC. 438 U.S. at 729-30. Furthermore, students at the assembly, unlike a radio listener, do not have the option of changing the station. Finally, the deleterious effects on the learning process, sexual role modeling, and the District's interest in teaching students to refrain from offensive ways of communicating their ideas are more particularized governmental interests than the City of Detroit's fear in *American Mini Theatres* that adult entertainment establishments would pose a threat to quality of life in certain neighborhoods. 427 U.S. at 53-56.

Most importantly, the District claims no authority to suppress completely the topic or "idea" of sexuality within the school environment.[7] It does seek authority to insure that sexuality is discussed responsibly and maturely at school sponsored activities, and to prohibit students from deliberately using sexually offensive innuendo before a captive audience. In this context, then, viewpoint neutral regulation of student speech based solely upon its intentionally offensive or indecent manner neither involves government censorship of ideas nor threatens suppression of classic works of literature.

4. This Court's Obscenity Doctrine Is Inapplicable.

Fraser argues that absent physical disorder, student speech must be legally "obscene" under *Miller v. California*, 413 U.S. 15 (1973) and *Ginsberg v. New York*, 390 U.S. 629 (1968), before a school may respond with disciplinary action. Resp. Br. at 10-11, 28-29. This Court's "obscenity" doctrine, however, is incapable of addressing the competing interests arising from sexually offensive student speech in the school environment.

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7. Indeed, the District's own construction of its disruptive conduct rule does not support Fraser's assertion that it is seeking to suppress the topic of sexuality. As construed, the rule prohibits only offensive and indecent speech, not the topic of sexuality. For example, if a student speaker nominated a candidate "because he or she would lobby the school administration to establish a family planning clinic within the school," such a speech, despite the controversy it might provoke among staff, students or parents, would not contain offensive or indecent language. Clearly, the District's rule is directed only toward the presentation of ideas in an offensive manner, not toward ideas or subjects that certain persons would find "offensive."

To review complete state suppression and criminal punishment of "obscene" speech, *Miller* articulated standards for determining whether the regulated expressive activity is entitled to any first amendment protection. *Ginsberg* acknowledged that a state has greater latitude with minors than with adults when regulating distribution of sexually oriented materials.[8] Neither *Miller* nor *Ginsberg*, however, purport to address situational restraints on otherwise protected indecent speech that are limited both spatially and temporally to the school environment.

To define constitutionally "obscene" speech is extraordinarily difficult at best, and in the opinion of several Justices, an impossibility. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73-114 (1973) (Brennan, J., dissenting). Requiring public schools to adopt rules specifically defining "obscenity" would not only impose an unworkable standard, (Pet. Br. at 34-35), but also ignore the compelling state educational interests that make public schools a "special environment" for first amendment purposes. The analytical and practical problems of sexually offensive student speech are simply not addressed by this Court's obscenity doctrine.

Finally, obscenity decisions are inapposite because they involve regulation of adult expression, not the speech of school children. The state typically has no legitimate concern with the content of offensive, but nonobscene,

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8. *Ginsberg* is not a true "obscenity" case. Instead, the issue turned on whether a statute that only prohibited distribution of certain materials to minors, but did not preclude adults from obtaining such materials, infringed upon an "area of freedom of expression constitutionally secure to minors." 390 U.S. at 637.

adult communication absent such factors as the presence of children or a captive audience. Educators have an interest both in protecting children compelled to attend school sponsored activities from unexpected exposure to indecent speech and in teaching the student speaker to refrain from such expression. Pet. Br. at 26-27. School children lack the experience to make fully mature decisions concerning their expressive faculties, and this immaturity warrants restrictions upon their first amendment rights. Pet. Br. at 26-27, U.S. Br. at 16-18. Because of the ongoing educational interest in the speaker's education, and because the first amendment rights of children are not coextensive with those of adults, *Miller* and its progeny are inapplicable.

5. The District's Position States a Workable Constitutional Rule.

Fraser argues the District proposes an unworkable constitutional rule. Resp. Br. at 31-33. This argument misstates the District's position. Indecent student expression at school sponsored activities is strictly incompatible with compelling state educational interests. Pet. Br. at 17-29. Because viewpoint neutral discipline of students for such speech does not implicate the core first amendment value of protecting the exchange of ideas, the following standard of review is warranted:

First, to establish a first amendment claim, Fraser had the initial evidentiary burden of proving that the decisive factor for the District's discipline was an intent to suppress or otherwise discriminate against his expression of a viewpoint on a matter of public concern.[9] Pet. Br. at

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9. This standard was clearly envisioned by Justice Harlan's dissent in *Tinker*. After acknowledging the application of

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17-21, 27-29. Absent such proof, no first amendment interests sufficient to warrant judicial scrutiny were implicated.

Second, assuming *arguendo* that Fraser could demonstrate viewpoint suppression on a matter of public concern was the decisive factor motivating the discipline, then under *Tinker*, the District demonstrated the speech caused a substantial disruption to the educational process and that further disruption could be reasonably forecast. Disruption of the educational process, moreover, is not limited to inability to maintain physical order; it also includes less tangible, yet nontheless real, emotional and social disruptions to the learning process. Even if the

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free expression rights in the public school environment, he observed:

> To translate that proposition into a workable rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than a legitimate school concern—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

393 U.S. at 526. (Harlan, J., dissenting). See *Pico*, 457 U.S. at 871-72. Although the District's standard explicitly addresses viewpoint suppression, it incorporates Justice Harlan's concern with articulating a clear threshold standard for student first amendment claims. Indeed, *Tinker*'s failure to articulate clearly its analytical framework, especially the weight to be accorded to the characteristics that make the public schools a "special" first amendment environment, has caused confusion and uncertainty in the circuit and district courts. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 482-86 (1981). The District's position does not require any modification of *Tinker*'s prohibition on viewpoint suppression, but rather seeks to restate clearly the threshold requirements of student first amendment claims, and the factors that must be evaluated in weighing them.

Court were to consider the discipline as viewpoint suppression, the record nonetheless demonstrates the District satisfied this more stringent standard.

Contrasted with this approach, Fraser's and the lower courts' analyses of indecent student speech turn any student disciplinary action based on verbal expression into a constitutional dispute. The district court placed an initial evidentiary burden on the District to prove Fraser's speech was either constitutionally obscene or physically disruptive. *Id.;* PC App. at B-2 to B-10. Indeed, it did not require Fraser to present any evidence at trial. Tr. of Proc. (CR 15) 2-26. This analytical approach, which the Ninth Circuit affirmed, reduces the federal judiciary from guardians of the fundamental guarantee of informed self government into a student conduct review board—such bathos is not the law.

6. "More Speech" by School Officials Fails to Redress the Constitutional Harm of Sexually Offensive Student Speech.

Fraser and the National Education Association argue the District was constitutionally precluded from disciplining Fraser because a less drastic response of "more speech" was available. Resp. Br. at 15-17, 22-25; NEA Br. at 5, 10-11. This approach not only usurps the discretionary authority of educators, but also exacerbates the very harm to the educational process that discipline of indecent student speech seeks to remedy.

The case authority for Fraser's "more speech" analysis is inappropriate for the school environment. Decisions such as *Shelton v. Tucker,* 364 U.S. 479 (1960), concern purportedly content neutral regulation of speech in traditional first amendment public fora that nonethe-

less impose incidental burdens on free expression rights. Because such governmental measures are not justified by reference to the content of the regulated speech, judicial scrutiny is appropriate to determine if less restrictive measures are available to effectuate the government's regulatory goals.

In the instant case, however, the deleterious impact of indecent student speech in the school environment supplies the constitutional rationale for the District's disciplinary action. In cases where a special environment, forum, or medium allows governmental responses based on content, this Court has not employed a "less drastic means" analysis. *See Connick v. Myers*, 461 U.S. at 150-52; *Pacifica*, 438 U.S. at 744-50. Accordingly, decisions concerning the incidental impact of time, place, or manner restrictions in a classic first amendment forum fail to address and weigh the competing first amendment interests arising in the public school environment.

When those interests are properly weighed, it is clear that indecent student speech at school conducted activities creates a harm that is not remedied by further expressive activity. Fraser's depiction of sexual activity was invasive of privacy interests, uniquely demeaning to female students, and disruptive to the learning environment. JA at 42-43, 72-81. Without prior warning or consent, his audience was forced to reveal publically their emotional reaction to a crude description of sexual activity.[10] Such

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10. This unconsented and unexpected invasion of the privacy rights of a captive audience of children also distinguishes the case authority Fraser cites on page 20, n. 45, of

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an assault upon intimate sensibilities was a constitutionally sound reason to restrict his expression. *See Cohen v. California*, 403 U.S. 15, 20 (1971); L. Tribe, *American Constitutional Law*, 681 (1978). To respond to such speech by expressing disapproval would only prolong or renew this harm. As the plurality noted in *Pacifica*, "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748-749. Fraser's audience could neither run nor turn the dial. The possibility of "more speech" does not afford him constitutional immunity because it would not redress the harm he inflicted on privacy interests.

A judicial search for less restrictive alternatives than discipline also deprives educators of control over school activities. In the analogous context of public employment, this Court in *Connick v. Myers* observed that the "First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." 461 U.S. at 149. Fraser's "more speech" argument would allow students, not administrators or teachers, to determine the educational agenda at school sponsored

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his brief. These cases concern distribution of written materials, such as underground newspapers, or involve the noncompulsory learning environment of university education. Because a student can refuse to read written materials, their distribution in itself does not pose a significant danger to privacy interests. Similarly, the context of distribution of written materials also poses a lesser risk that offensive expression will be perceived as authorized by school authorities. These factors warrant more intensive judicial scrutiny of measures restricting the distribution of written materials. See Pet. Br. at 31, n.5.

events. Student speakers could effectively dominate and disrupt such activities by use of offensive forms of expression if the first amendment precluded school authorities from any response except "rebutting" such speech. The federal constitution does not require school administrators to run their educational programs as debating societies for students that use sexually offensive means to express themselves.

Finally, "more speech" may be a sound educational response to offensive student speech in certain circumstances, but to say that response is the only constitutionally sound one usurps the discretion and diversity in educational policy essential to our nation's system of public education.[11] Fraser's and the NEA's "more speech" argument is an ill-disguised attempt to impose one educational philosophy as a federal constitutional imperative. Absent suppression of viewpoint on matters of public concern, a public school's response to indecent speech should be committed to the discretion of local educators and policymakers.[12]

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11. The District exercised this discretion permissibly when it chose not to discipline students carrying signs with sexual innuendo the day following Fraser's speech or other students that allegedly engaged in similar conduct in prior years. See Resp. Br. at 30, n.57. Concerning Fraser's allegations of "selective enforcement" of the disruptive conduct rule, the record demonstrates the discipline was not motivated by his purported criticism of the school administration in the assembly speech or in prior incidents. See pp. 6-7, *supra*. Accordingly, this claim is also meritless and should be dismissed. *See Wayte v. United States*, 84 L.Ed.2d 547, 105 S. Ct. 1524 (1985).

12. The District does agree with Fraser that it must teach constitutional principles both in practice and in theory. Resp. Br. at 25. Indeed, the District hopes that its discipline of Fraser

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7. The Disruptive Conduct Rule Gave Fair Warning to Fraser.

Fraser misconstrues both the scope and construction of the District's disruptive conduct rule.

First, the plain language of the rule defines "disruptive conduct" to include the use of "obscene" language by students. As construed by the school district, "obscene" language means conduct or language "offensive to modesty or decency; indecent, lewd." JA at 103. Contrary to Fraser's assertions (Resp. Br. at 37-38), the District's construction of the rule and its application to Fraser's assembly speech was reasonable and thus controlling. *Board of Education v. McClusky*, 458 U.S. 966, 968-69 (1982) (per curiam). Pet. Br. at 32.

Second, the rule as applied gave Fraser fair notice his conduct was prohibited. Although he asserts no one told him his speech would violate a school rule, the record reveals that the teachers who previewed his speech (1) advised him it was inappropriate and not to give it (JA at 30), and (2) warned that it would "cause problems," have "negative consequences," and implied that a suspension might result. JA at 60-61. Furthermore, the very fact Fraser sought out teachers to preview his speech is indicative that he knew it might result in disciplinary action. Despite these warnings, he chose to deliver the speech.

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will teach that the first amendment does not render school authorities impotent to deal with students that impose upon the privacy and equal education opportunity rights of others by gratuitously and deliberately expressing themselves in a sexually offensive manner at school functions.

Finally, Fraser presumes that he is entitled to assert a facial overbreadth challenge. Resp. Br. at 40-41.[13] Clearly, his verbal assault fell squarely within the proscription of the disruptive conduct rule, and thus application of the rule to hypothetical factual situations should not be entertained. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-618 (1973); Pet. Br. at 33-35.

8. Removal of Fraser's Name from the List of Graduation Speakers Is Not Moot.

Fraser argues removal of his name as a candidate for graduation speaker is a moot issue because the judgment awarding damages does not rest upon this ground. Resp. Br. at 42. The record, however, reveals that Fraser's complaint sought damages for all of his constitutional claims. JA at 12. The district court did not allocate damages among the claims, but rather directed the parties to try to stipulate to the amount of a damage award, which they did. PC App. at B-10, C-4 to C-5. Because the record does not reveal any allocation of the damage award among Fraser's successful claims, and because the trial court specifically entered a declaratory judgment, as well as an injunction, invalidating removal of Fraser's name, (PC App. at C-1 to C-3), the money judgment rests, in part, on this issue and the parties still have a monetary stake in its outcome.

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13. Fraser's argument that the District's rule is overbroad because teenagers are regularly exposed to sexual metaphor on television or at the movies (Resp. Br. at 41) scarcely warrants a constitutional rule that the decorum of school sponsored events must be reduced to the tastelessness of network programmers or producers of teenage sex comedies.

In addition, the case authority Fraser cites on the removal issue is inapposite. Resp. Br. at 42. *Procunier v. Martinez*, 416 U.S. 396 (1974), involved prison regulations allowing censorship of prisoners' mail; it does not involve denial of a student's privilege to participate in an extracurricular school activity as a form of discipline. Similarly, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), involved a statute imposing a prior restraint on habitual distributors of obscene materials; it, too, is not applicable to school disciplinary measures.

9. The District Court's Sua Sponte Decision on a State Law Issue Was a Reversible Abuse of Discretion Under Federal Law.

Fraser misconstrues the fourth question accepted for review by the court. Resp. Br. at 42-43. The actual issue is whether the district court abused its discretion by exercising pendent jurisdiction over and incorrectly deciding a state law issue concerning the Washington State Board of Education's rules on student discipline. The district court's abuse of discretion in its assumption of pendent jurisdiction, especially because that discretionary authority was exercised *sua sponte*, is grounds for reversal of the judgment under federal law. Pet. Br. at 38-41. *See Financial General Bank Shares, Inc. v. Metzger*, 680 F.2d 768, (D.C. Cir. 1982); *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974).

CONCLUSION

The District respectfully urges the Court to reverse and vacate the judgments of the Ninth Circuit Court of Appeals and the district court, and remand the case with instructions to enter an order of dismissal with prejudice or an order of remand for further proceedings consistent with appropriate constitutional law standards.

DATED: February 12, 1986.

Respectfully submitted,

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